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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

V.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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AND

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ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. IS THE RIGHT TO COUNSEL ON APPEAL A DUE PROCESS OR AN EQUAL PROTECTION RIGHT?

2. WHERE:

(A) UNIFORMLY APPLICABLE STATE RULES OF APPELLATE PROCEDURE REQUIRE NO BRIEF IN A CRIMINAL APPEAL.

(B) BUT, REQUIRE THE APPELLATE COURT TO SEARCH THE RECORD FOR ERROR IN ALL CASES,

(C) UNDER SUCH RULES A CRIMINAL APPELLANT'S LAWYER AS A MATTER OF STRATEGY FILES NO BRIEF ON ORIGINAL SUBMISSION BUT DOES APPLY FOR REHEARING WITH A SUPPORTIVE BRIEF AND DOES APPLY FOR DISCRETIONARY REVIEW BY THE STATE SUPREME COURT WITH A SUPPORTIVE BRIEF.

IS THE CRIMINAL APPELLANT DEPRIVED OF HIS U.S. CONSTITUTIONAL RIGHT TO COUNSEL ON APPEAL?

3. IS THE INEFFECTIVE ASSISTANCE OF COUNSEL AS TO SPECIFIC ACTS OR OMISSIONS GROUNDS FOR HABEAS CORPUS RELIEF UNDER 28 U.S.C. 2254 WHERE THE ALLEGED SPECIFIC IMPROPER ACTS OR OMISSIONS OF DEFENSE COUNSEL HAD NO PREJUDICIAL EFFECT ON THE CASE?

PARTIES

In the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit the parties were Danny Ray Mylar, alias, Miles, Respondent herein, and Robert G. Britton, Commissoner, and The State of Alabama, Petitioners herein.

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OPINIONS BELOW

The judgment and opinion of the United States District Court is not published but is submitted as Appendix "A" hereto.

The orders and opinion of the United States Court of Appeals are submitted as Appendix "B" hereto and are reported as: Mylar v. Alabama (11th Cir., 1982) 671 F.2d 1299.

JURISDICTION

The order of the United States Court of Appeals reversing the District Court's order denying the writ was issued on April 1, 1982. Rehearing was denied on April 29, 1982, and this petition is filed within sixty days of that date.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Appeals decided this case under the Sixth Amendment to the Constitution of the United States, in particular that portion which reads:

> "In all criminal prosecutions, the accused shall enjoy the right. . .to have the Assistance of Counsel for his defense."

The Petitioners insist that the case ought to have been decided under the Fourteenth Amendment to the Constitution of the United States, in particular that portion which reads:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall. . .deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2254. The same being voluminous is submitted as Appendix "C" hereto.

Title 12, Section 12-22-240, Code of Alabama, 1975. The same reading:

> "§ 12-22-240. Consideration of cases by court of criminal appeals generally.
>
> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgments as the law demands."

STATEMENT OF THE CASE

The following statement is based entirely on the opinions and orders of the four courts which heretofore have examined these matters and which are contained the Appendix to this petition.

Following his conviction in State Court for murder in the first degree, the Respondent Danny Ray Mylar also known as

"Miles" appealed to the Court of Criminal Appeals of Alabama. Under applicable Alabama statutes, rules and judicial constructions, criminal appellants' lawyers, whether appointed or retained, were not required to file briefs on original submission, but the Court was required to search the record for error in all cases, without regard to briefs or the lack thereof. Mylar's attorney relying on these rules, filed no brief on original submission. (Miles v. State, [Cr. App. Ala., 1977] 343 So.2d 801,802, Appendix "D"; District Court's opinion, Appendix "A", pp. 5-10; Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, 1300, Appendix "B", p. 91).

The Court of Criminal Appeals of Alabama affirmed Mylar's conviction with a five page opinion which discussed the following issues: (1) the introduction

of the transcript of the cross examined preliminary hearing testimony of one Yarber (Mylar's co-defendant) (343 So.2d 801, 802-804); the cooroboration of Yarber's evidence (343 So.2d 801, 804-802) and Mylar's liability as an accomplice (343 So.2d 801, 805-806) the Court concluded its opinion with the following:

> "We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none.
>
> "The judgment of conviction is affirmed."
>
> (343 So.2d 801, 806, Appendix "D")

(Miles v. State [Cr. App. Ala., 1977] 343 So.2d 801, Appendix "D")

Mylar's appointed attorney then applied for rehearing and for discretionary review by the Alabama Supreme Court, in each instance filing a brief. Rehearing and certiorari were denied. (Miles v. State [Cr. App. Ala., 1977] 343 So.2d

801, Ex parte Miles [S.Ct. Ala., 1977] 343 So.2d 806, Appendix "D", pp. 112 and 124; District Court's opinion, Appendix "A", pp. 6-8; Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, 1300, Appendix "B", pp. 90-91).

Mylar then petitioned the U.S. District Court for the Northern District of Alabama for a writ of habeas corpus under 28 U.S.C. 2254, Mylar raised numerous claims in addition to the matters at issue here but these were decided against him in the Courts below and are not directly relevant here. On the matter at issue here the District Court denied the writ on the basis of the matters set out above and the following:

> ". . .It is very possible that counsel for petitioner, after examining the trial record, believed it was the best strategy to have the Alabama Court of Criminal Appeals search the record for error...." (Appendix "A", pp. 7).

(District Court's Judgment and opinion, Appendix "A")

On appeal, the United States' Court of Appeals for the Eleventh Circuit reversed and ordered that Mylar be granted a second out-of-time appeal because of his lawyer's failure to file a brief on original submission. Mylar v. Alabama ([11th Cir., 1982] 671 F.2d 1299 Appendix "B").

The Petitioners herein applied for rehearing, suggesting rehearing en banc. The matters at issue here had been raised and argued throughout the prior proceedings, but on rehearing the Petitioner expressly raised the points raised here. The application for rehearing was denied. (Mylar v. Alabama [11th Cir., 1982] 671 F.2d 1299, Appendix "B", pp. 101-102.)

STATEMENT OF THE FACTS

It would not be appropriate here to detail the facts of Mylar's abuse and

ultimate murder of two helpless citizens. These are available in Appendix "D" and also in the report of Mylar's co-defendant's case. Yarber v. State (Cr.App. Ala., 1977) 375 So.2d 1212. However, it should be mentioned that both Mylar and Yarber presented the same defense. They each claimed that the other was more guilty. On this point, the Alabama Court of Criminal Appeals wrote:

> "...It is noteworthy that appellant testified at his own trial and his testimony as to all the details, places, and circumstances leading up to and culminating in the robbery, kidnapping and killing of Mrs. Knabe and Mr. White, in the main, pig-tracked the testimony of Yarber with one exception: Appellant claimed that Yarber was the leading actor in the entire drama and it was Yarber who did all the things that Yarber accused appellant of doing...." (343 So.2d 801, 805-806, Appendix "D", p. 118).

> "...This was a cold-blooded murder without any mitigating or extenuating circumstances. Two helpless and defenseless victims were robbed, kidnapped and shot to death. It does not matter which of the two men actually pumped the bullets into the

bodies of Mrs. Knabe and Mr. White, they were both equally guilty of murder and must pay the penalty of the law..." (343 So.2d 801, 805-806, Appendix "D", p. 123)

SUMMARY OF THE ARGUMENT

I. The right to counsel on appeal is an equal protection right.

A. There is an apparant conflict in the decisions of this Honorable Court holding that the only constitutional requirement in State appeals of State convictions is equal protection (e.g. Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 [1956]; Estelle v. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 [1974] and Wainwright v. Torna, ___ U.S. ___, ___ L.Ed.2d ____, ____S.Ct. ___, 50 U.S.L.Wk. 3759 [1982]) and those which hold, or at least imply, that there are constitutional requirements beyond equal protection. Anders v. California, 386 U.S. 738, 18 L.Ed2d 493, 87 S.Ct. 1396 (1967); Entsminger v. Iowa,

386 U.S. 784, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967). Conflicts result when the State Courts follow one line of apparant authority and the Federal Courts follow the other. This Honorable Court should issue the writ to reconcile these cases.

B. If Anders v. California (above) and Entsminger v. Iowa (above) can be reconciled with the equal protection cases, it is by limiting them to their specific holdings, to wit, that the State must provide indigent criminal appellants with advocate attorneys rather than amicus curiae. The apparant conflict mentioned in "A", above, arises when these cases are treated as requiring a certain sort of advocacy. Since Mylar's lawyer was appointed as and acted as an advocate, the Court of Appeals decision is in conflict with Anders and Entsminger, above.

C. In numerous cases this

Honorable Court has held that in appeals the States need only guarantee equal protection. Since Mylar's appeal was treated exactly the same as any other, he has no equal protection claim. On this point, the Court of Appeals ruled contrary to the prior decisions of this Honorable Court.

II. This Honorable Court has held that habeas corpus is not available to review strategy decisions by a State prisoner's lawyer. Estelle v. Williams, 425 U.S. 501, 512, 48 L.Ed.2d 126, 135, 96 S.Ct. 1691 (1976). Since the failure of Mylar's attorney to file a brief was a matter of strategy, the Court of Appeals ruled contrary to this prior decision of this Honorable Court.

III. Numerous Circuits have held that where a claim of ineffective assistance of counsel is based on specific acts and omissions of counsel, the claimant

must show not only the ineffectiveness of the acts or omissions but also that the same adversly affected the case. As a matter of law, the failure of Mylar's attorney to file a brief had no effect on his appeal. Therefore, in ordering relief for Mylar, the Court of Appeals ruled contrary to the decisions of other Circuits.

ARGUMENT

I.

CONSTITUTIONAL RIGHTS IN APPEALS ARE EQUAL PROTECTION IN NATURE

A.

REASON FOR GRANTING THE WRIT: AN APPARENT CONFLICT AMONG THE DECISIONS OF THIS HONORABLE COURT

From 1894 onward, this Honorable Court has adhered to the principle that there is no constitutional right to appeal. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894). In

the 1950's, while expressly adhereing to McKane ,this Honorable Court held that, if a State provided appeal, it could not do so in a manner which discriminates against the poor. E.g. Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); Brown v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959); Lane v. Brown, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963), and Draper v. Washington, 372 U.S. 487, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963). Typical of the reasoning in these cases is that found in Griffin:

> "...It is true that a State is not required by the Federal Constituion to provide appellate courts or a right to appellate review at all. See, e.g., McKane v Durston, 153 US 684, 687, 688, 38 L ed 867-869, 14 S Ct 913. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty...." (351 US 12, 18, 100 L.Ed 891, 898).

Then on May 8, 1967, this Honorable Court vacated State appellate procedures in two cases in which there was no real suggestion of indigents receiving different treatment. Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967); Entsminger v. Iowa, 386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 (1967). The basis of these decisions is seen in the Court's statement of the issue in Entsminger:

> "...This case, which was argued following Anders v California, 386 US 738, 18 L ed 2d 493, 87 S.Ct 1396, presents a similar problem in that we are here also concerned with the constitutional requirements which are binding on a State in the administration of its appellate criminal procedures with respect to convicted indigents seeking initial review of their convictions...." (386 U.S. 748, 749, 18 L.Ed.2d 501, 502) (Emphasis supplied).

These cases strongly suggested a departure from the equal protection approach. However, subsequent decisions by this

Honorable Court clearly show continued adherence to equal protection as the only requirement binding state appellate procedure. E.g. Ross v. Moffit, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974);[1] Estelle v. Dorrough, 420 U.S.

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[1] "...The Court of Appeals correctly recognized that there is no federal constitutional right to state appellate review of state criminal convictions. McKane v Durston, 153 US 684, 687, 38 L Ed 867, 14 S Ct 913 (1894); Griffin v Illinois, 351 US 12, 18, 100 L Ed 891, 76 S Ct 585, 55 ALR2d 1055.

* * *

"...That court recognized that appeals from state criminal convictions are not "explicitly or implicitly guaranteed by the Constitution," San Antonia Independent School District v Rodriguez, 411 US 1, 33-34, 36 L Ed 2d 16, 93 S Ct 1278 (1973), and that this Court in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases had applied the traditional rational-basis test...." (420 U.S 534, 536-538, 43 L.Ed.2d 377, 380-381).

534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, ___ U.S. __, ___L.Ed.2d ___, ___ S.Ct. ___, 50 U.S. L.WK. 3759 (1982).[2]

Although, as will be suggested in the next section, Anders and Entsminger can be reconciled to the equal protection line of cases, if they are limited to their holdings, there appears to be two lines of authority on the subject of constitutional requirements for appeals--Anders and Entsminger suggesting that there are certain minimum due process requirements, and all of the other cases holding that the only consitutional requirement is equal treatment.

The problem is that State Courts

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[2] Wainwright v. Torna was decided March 22, 1982, nine (9) days before the Court of Appeals decision in this case and was expressly called to the attention of the Court of Appeals on application for rehearing.

tend to follow the equal protection approach, while Federal Courts tend to follow the due process approach suggested by Anders and Entsminger.[3] The problem is compounded by the fact that, while State government can control most aspects of the appellate process so as to grant equal review, it can not, under the adversary system, control the conduct of appellants' lawyers.

The result of this is that the Federal Courts of appeal have, under Anders and

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[3] For example:

"...This court has long recognized that where a defendant has failed to obtain a fair appelate review of his conviction by reason of the denial to him of a constitutionally guaranteed right, means have been found to rectify the wrong by providing an appellate review of the conviction. Williams v. United States, supra, 402 F.2d at 552..." Robinson v. Wyrick [8th Cir., 1981] 635 F.2d 757, 759).

Compare the language quoted from Ross v. Moffit, above at page 15.

and Entsminger created a whole body of law on how a criminal appellant's lwyer must handle a state appeal of a state conviction. The lawyer must perfect and pursue the appeal, (Chapman v. United States [5th Cir., 1972] 469 F.2d 634, relied on by the Court of Appeals in the instant case.), obtain the the timely filing of the record. (Cantrell v. Alabama [5th Cir., 1977] 546 F. 2d 652, cert.den., 431 U.S. 959, 53 L.Ed.2d 278, 97 S.Ct. 2687), file a brief (Passmore v. Estelle [5th Cir., 1979] 607 F.2d 662, cert.den., 446 U.S. 937, 64 L.Ed.2d 789, 100 S.Ct. 2155) and the brief must argue alleged errors. (Robinson v. Wyrick [8th Cir., 1981] 635 F.2d 757). Also, since the Courts of Appeal see these principles as being due process in nature, they apply equally to indigents and non-indigents. Chapman v. United States, above, and Cantrell v.

Alabama, above.

While the Federal Courts follow this due process approach, the State Courts, or at least the Alabama Courts, follow the decisions of this Honorable Court mandating equal protection only. The State Courts consider that they are complying with the Constitution in applying their rules so as to guarantee equal appellate review in all cases. Thus, if an appellant's lawyer fails to file a brief and the Attorney General requests the Court to either require the filing of a brief or appoint other counsel, the request will be denied, because no brief is required, the Court reviews the record in all cases and, in any event, the appellant has received and will continue to receive equal appellate review, regardless of his lawyer's acts

or omissions.[4] Yet, when that same case gets before the Federal Courts on habeas corpus, an out-of-time appeal will be ordered because the lawyer filed no brief. The result of all this is that the State rules of appellate procedure are rendered meaningless, since any violation of them by an appellant's attorney simply produces an out-of-time appeal.

It is respectfully submitted that there is a great need for this Honorable Court to clarify the holdings in Anders and Entsminger so as to make them

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[4] This is based on the actual experience of the Alabama Attorney General's Office in many, many cases.

consistant with both prior and subsequent opinions.

B.

MYLAR'S LAWYER WAS AN ADVODATE, NOT AN AMICUS CURIAE

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR SUPREME COURT DECISIONS

The Court of Appeals decided this case under Anders v. California (386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 [1967]) and Entsminger v. Iowa (386 U.S. 748, 18 L.Ed.2d 501, 87 S.Ct. 1402 [1967]). In each of these cases appellants' lawyers determined that there was no merit to the appeal and proceeded to limit the Appellate Court's review of

their client's case. In Anders the lawyer filed a "no merit" letter, and in Entsminger the lawyer intentionally failed to have the transcript of the evidence filed in the Appellate Court. This Honorable Court struck down both cases because the lawyers had acted as amicus curiae rather than advocates. In the previous section it was argued that Anders and Entsminger are in apparent conflict with this Honorable Court's other decisions on the Constitution and appeal. However, if these cases are limited to their specific holdings, i.e., that the States must provide indigents with advocates rather than amicus curiae, they are easily and obviously reconcilable with the equal protection cases. The apparent conflict arises when these cases are read, not merely as requiring

that the lawyer be an advocate but as requiring that he advocate in a certain sort of way.

In every case a lawyer is in the paradoxical situation of serving two masters--the Court and his client. For his client the lawyer must advocate, which, as a practical matter, means try to win the case. But, on the other hand, the lawyer must not mislead the Court as to the law and the facts. Surely this Honorable Court in Anders did not intend to encourage the filing of frivolous briefs making spurious arguments in appeals.[5] If the lawyer in Anders saw no possible error in the record, he was not obligated to argue that which he did not believe, but he could have kept his opinions to himself. If California

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[5] It must be pointed out one of the results of the Anders rule has been the filing of such briefs in many cases.

required him to file a brief, he could have filed one setting out the adverse rulings and either explaining why they were not error[6] or generally arguing that they might be error. In either case, the attorney would have been acting as an advocate for his client with what he had.

To act as an advocate, as required by Anders and Entsminger, a lawyer must have freedom to decide how to handle the case. Litigation is an art not a science. The need for discretion in the attorney was recognized by this Honorable Court at the trial level in Estelle v.

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6 "...Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal...." (Anders v. California, 386 U.S. 738, 744, 18 L.Ed.2d 493, 498, 87 S.Ct. 1396 [1967]).

Williams (425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 [1976]), wherein the Court wrote:

> "...Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system...." (425 U.S. 501, 512, 48 L.Ed.2d 126, 135).

In reading Anders and Entsminger as requiring that lawyers handle appeals in certain ways, the lower courts are re-writing "...the duties of...judges and counsel in..." appeals. The point of Anders and Entsminger is that in each of those cases, the lawyers' actions were dictated by determinations that the appeals were not meritorious. In Entsminger the lawyer decided not to cause the filing of the transcript of the evidence. Suppose, however, that the

lawyer's action was based on strategy considerations. Suppose Entsminger's lawyer saw a technical point in the indictment as the only hope for reversal and decided not to bring up the transcript of the evidence, because he (1) wanted to spotlight the indictment and (2) did not want the appellate Court distracted by the details of Entsminger's crime. Would the result have been the same? It is respectfully submitted that it would not.

If Anders and Entsminger stand only for the proposition that an indigent appellant must be provided with an advocate, then the Court of Appeals ruled in conflict with them, since Mylar's lawyer in this case was clearly an advocate. This lawyer was in no sense an amicus curiae. His not filing a brief on original submission was proper under the Alabama Rules. It in no way prejudiced

his client and was a strategic decision, as will be discussed more thoroughly below. His status as an advocate was underlined by his applying for rehearing and certiorari.

Since Mylar was provided with an advocate, as required by Anders and Entsminger, the decision of the U.S. Court of Appeals is contrary to this Honorable Court's decisions and opinions in those cases.

C.

MYLAR RECEIVED EQUAL PROTECTION OF THE LAW

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT AND ANOTHER COURT OF APPEAL

As discussed in Subsection "A", above, this Honorable Court has consistently held that appeal is a matter of State law, in which the only constitutional requirement is equal treatment.

E.g. McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894); Griffin v. Illinois, 351 U.S. 12, 100 L.Ed.2d 891, 76 S.Ct. 585 (1956), Brown v. Ohio, 360 U.S. 252, 3 L.Ed.2d 1209, 79 S.Ct. 1164 (1959), Lane v. Brown, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963), Draper v. Washington, 372 U.S. 487, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963); Ross v. Moffit, 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974); Estelle V. Dorrough, 420 U.S. 534, 43 L.Ed.2d 377, 95 S.Ct. 1173 (1974); Wainwright v. Torna, ___ U.S. ___, ___L.Ed.2d ___, ___S.Ct. ___, 50 L.WK. 3579 (1982). Now, if the only constitutional requirement binding on the States in appeals is equal treatment, then a claim of discrimination would be jurisdictional in a proceeding under 28

U.S.C. 2254(a)[7]. In other words, a claim by a State prisoner relating to a State court appeal could not state any violation of his rights, privileges or immunities under the Constitution, laws or treaties of the United States unless it alleged, at a minimum, different treatment. Now, Mylar's claim, which was accepted by the Court of Appeals, is simply that his lawyer filed no brief on original submission. Mylar does not and indeed can not claim that his appeal was treated differently either because of indigency or because his lawyer filed no brief. The fact is that Mylar was simply

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[7] "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States." (28 U.S.C. 2254[a], Appendix "C").

not treated differently on appeal.

The only discrimination which could have been visited on Mylar because of indigency was the granting of a free record and attorney, but this would be necessary in order to bring an indigent up to the level of a non-indigent appellant. Thus, this discrimination produced equality rather than inequality.

Did the attorney's failure to file a brief on original submission limit the appellate court's review of Mylar's case? As the District Court found, Mylar's case was not the first Alabama appeal in which no brief was filed, indeed this has been common practice in Alabama for over a century. For example, in 1869 William Whitaker found himself indicted in Limestone County, Alabma, for assault. Whitaker attacked the indictment by a habeas corpus petition, which was denied. On appeal to the Alabama Supreme Court no

brief was filed for or by Whitaker. On that subject, the Alabama Supreme Court wrote:

> "By § 4314 [8] of the Revised Code, no assignment of errors is necessary in criminal cases, but this court must look to the whole record, and render such judgment on the record as the law demands." (Ex parte: Whitaker, 43 Ala. 323 [1869]).

Thus, for over a century before Mylar's case came before the Alabama Courts, appeals had been reviewed without regard to briefs or the lack thereof. The obvious purpose of these statutes and the decisions construing them was to guarantee that the quality of appellate

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8 "§ 4314. (763) Assignment of error, or joinder unnecessary.--In cases taken to the supreme court under the provisions of this chapter no assignment of errors, nor joinder in error, is necessary; but the court must render such judgment on the record as the law demands." (§ 4314 Code of Alabama, 1867).

See also Code of Alabama, 1852, § 3663 and Code of Alabama, 1843, Chapter XIII, § 7, page 470.

review did not depend on whether a party had a lawyer nor on the quality of his lawyer if he had one.

By the time of Mylar's appeal, the applicable statute read thusly:

> "§ 12-22-240. Consideration of cases by court of criminal appeals generally.
>
> "In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands..." (Title 12, Section 12-22-240, Code of Alabama, 1975).

This section and its statutory predecessors required the Appellate Court to search the record for error, whether a brief was filed or not. Hughes v. State, 213 Ala. 555, 105 So. 664, 665 (1925)[9];

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[9] "While we have treated only the questions discussed in brief of appellant's counsel, we have not been unmindful of the statutory requirement to search the record for error, which has been done and we fail to find where the trial court, has committed reversible error." (105 So. 664, 665)(Emphasis supplied).

Wesson v. State, 238 Ala. 399, 191 So. 249, 250 (1939)[10]; Harris v. State (Cr. App., 1979) 371 So.2d 979, 981,[11] cert. den., 371 So.2d 984. Because of this section, no criminal appellant need file on brief. Adams v. State, 280 Ala. 678, 198 So.2d 255 (1967); Johnson v. State, 257 Ala. 644, 60 So.2d 818 (1952); Bertalsen v. State, 20 Ala. App. 539, 103 So.

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10 "It has been said that this statute, construed in pari materia with others embodied in said chapter, makes the right of appeal in criminal cases one of substance imposing on the court a duty to search the record for errors..." (191 So.2d 249, 250)(Emphasis supplied).

The case was reversed on grounds not argued in brief.

11 "...Although only the issue of the refused charges was expressly presented on this appeal, it is our statutory duty to search the record for any error which was duly preserved at trial. Section 12-22-240, Code of Ala. 1975. Therefore, four other points raised only at trial have been considered....(371 So.2d 979, 981).

The case was reversed on grounds not argued in brief.

480, (1925); Brown v. State (Cr. App. Ala., 1981) 396 So.2d 137, 138.[12] Thus, Mylar's case was in no way prejudiced by the fact that his attorney filed no brief. The Alabama Court of Criminal Appeals was required to search the record for error, and the Court's opinion stated and demonstrated that it did so.[13]

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12 "By statute, this Court is charged with the duty of considering 'all questions apparent on the record or reserved in the circuit court." Alabama Code 1975, Section 12-22-240. This obligation exists even though the defendant has not filed a brief on appeal. Higginbotham v. State, 262 Ala. 236, 78 So.2d 637 (1955)...." (396 So.2d 137, 138).

NOTE: In each of these cases, Adams, Johnson, Bertalsen and Brown, no brief was filed by or on behalf of the Appellant, but the conviction was reversed.

13 Of course, there was no "search the record" requirement on rehearing or certiorari. Walden v. State, 240 Ala. 193, 198 So. 264, 265 (1940); DeGraaf v. State, 34 Ala. App. 137, 37 So.2d 130, 136 (1948). However, incident to these proceedings Mylar's attorney filed briefs.

Since Mylar has no claim that he was treated differently from any other Alabama Criminal Appellant, how can he claim a denial of equal protection? In a case similar in many respects to the instant case, the Tenth Circuit considered this same issue and reached the opposite conclusion from that reached by the Eleventh Circuit. In Hill v. Page ([10th Cir., 1971] 459 F.2d 679) a state prisoner sought Federal habeas corpus claiming that he had been denied effective assistance of counsel on appeal because his lawyer had filed no brief. The Tenth Circuit rejected this claim because the lawyer's failure to file a brief triggered a procedure by which the appellate court searched the record for

"fundamental error"[14] and, in any event, the attorney did apply for rehearing. If the Eleventh Circuit had followed the same rule, it could not have reached the conclusion it did.

Far more serious than the conflict with the Tenth Circuit are the patent conflicts between the Eleventh Circuit's decision in the instant case and those of this Honorable Court on the same subject. Since Mylar received equal, indeed the same, treatment that any other Alabama Criminal appellant received, he was not deprived of any right, privilege, or immunity under the Constitution nor any law or

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[14] It must be observed that this procedure is much more limited than the Alabama procedure. In Alabama the "search the record" rule applies equally in briefed and unbriefed cases and the search is for all "...questions apparent on the record reserved in the..." trial court. Title 12, § 12-22-240, Code of Alabama, 1975.

treaty of the United States, and the Eleventh Circuit in holding that he was, ruled contrary to the numerous prior decisions of this Honorable Court holding that a state criminal appellant's constitutional rights on appeal are limited to equal protection.

II.

MYLAR'S ATTORNEY HAD THE DISCRETION NOT TO FILE A BRIEF ON ORIGINAL SUBMISSION AS A MATTER OF STRATEGY

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT

Why would a lawyer file no brief on original submission but apply for rehearing and certiorari? Incompetence? Laziness? Cowardice? Why? With regard

to competence, the Court of Criminal Appeals observed:

> "...Throughout the trial proceedings appellant was represented by the widely known law firm of Wilkinson, Purvis, Pickard & Parsons of Birmingham.[15] All of these lawyers are experienced in trial work and are noted for their resourcefulness, ingenuity and astuteness in protecting the constitutional rights of their clients..." (Miles v. State [Cr. App. Ala., 1977] 343 So. 2d 801, 802)

The trial record (Respondent's Exhibit "A" in these proceedings) reveals a highly competent and vigorous defense; the same competence and diligence was demon-

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15 The same lawyers represented Mylar in the appeal.

strated on rehearing and certiorari.[16] These same documents, which compel the rejection of any suggestion of incompetence or laziness, also defeat any suggestion of cowardice. So, we are left with the original question--Why? There is but one answer: strategy.

The only possible error on appeal related to the introduction of the cross-examined preliminary hearing testimony of Yarber, Mylar's co-defendant. This testimony had been procured by a promise from certain police officers that they would not arrest him, if Yarber would testify against Mylar. The facts

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[16] Since, as discussed in the immediately preceding subsection, no brief is required on original submission, the Alabama Courts accept "briefs" in practically any form and accept them at any time up to the day the decision is actually issued. The same is not, of course, true of rehearing or certiorari. See DeGraff v. State, 34 Ala. App. 137, 37 So.2d 130, 136 (1948).

surrounding this deal had the appearance, at first glance, of possible impropriety--an appearance which could not survive any serious analysis.[17] If there was no error with regard to Yarber's testimony, it was difficult to see where there was error. If counsel filed a brief he would have had to analyize these points, and he would certainly have triggered an analysis by the Attorney General. On the other hand, the point was well preserved and would no doubt be noticed by the Court in its search of the record.[18] There was the possibility that the Court would act on first impressions and reverse. In addition, it was

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[17] See Ohio v. Roberts, 448 U.S. 56, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980); California v. Green, 399 U.S. 149, 26 L.Ed.2d 489, 90 S.Ct. 1930 (1970).

[18] Which, of course, it was. Miles v. State (Cr. App. Ala., 1977) 343 So.2d 801, 804.

always possible that the Court of Appeals would notice something elsewhere in the record that counsel had overlooked. In any event, nothing was waived by the failure to file a brief, so this was a safe strategy.

This Honorable Court has recognized defense counsel's right and duty as an advocate to exercise discretion in strategy and has held that federal habeas corpus is not available to grant relief from strategy decisions by counsel. Estelle v. Williams, 425 U.S. 501, 512, 48 L.Ed.2d 126, 135, 96 S.Ct. 1691 (1976). The U.S. District Court based its denial of the writ in part on a finding that the attorney's failure to file a brief was based on strategy considerations. Strategy was argued in the U.S. Court of Appeals both in the State's brief and on rehearing. Yet, the Eleventh Circuit at no point in its opinion

mentions strategy. Obviously, the Court of Appeals decision is in conflict with Estelle v. Williams, above.

III.

WHERE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS BASED ON SPECIFIC ACTS OR OMISSIONS OF COUNSEL, THE CLAIMANT MUST ESTABLISH THAT PREJUDICE RESULTED THEREFROM

REASON FOR GRANTING THE WRIT: CONFLICT AMONG THE CIRCUITS

In the previous sections it has been argued that counsel's failure to file a bried did not violate Mylar's constitutional rights and did not constitute ineffective assistance of counsel. In this section these points are conceded for the sake of argument.

The Fourteenth Amendment requires that Criminal convictions be obtained in accordance with due process of law. Due process of law requires that criminal defendants be attended by attorneys and, it is now almost universally held, that

attorneys must act in reasonably effective ways. The problem is that it is the State, the Public, which owes the duty of reasonably effective assistance and which will have to pay in money or social harm if it is not granted, but in fulfilling its duty the State must rely entirely on a defense attorney who it may not have selected, cannot control and who is charged with "...advancing the 'undivided interests of his client....'" Polk County v. Dodson, ____ U.S.____, 70 L. Ed.2d 509, 517, 102 S.Ct. ___, 50 U.S. L.WK. 4077, 4079 (1981). It is in this context that the prejudice requirement has developed in the Circuits.

The rule of many Circuits is that where a prisoner raises a claim of ineffective assistance of counsel based on specific acts or omissions of his attorney, he must show that the Attorney's acts and omissions (1)

amounted to ineffective assistance and (2) actually prejudiced the case. This was the conclusion reached by the Ninth Circuit, sitting en banc, in Cooper v. Fitzharris, ([9th Cir., 1978] 586 F.2d 1325, 1331ff, cert.den., 440 U.S. 974, 59 L.Ed.2d 793, 99 S.Ct. 1542. In reaching this conclusion, the Ninth Circuit relied on this Honorable Court's affirmance of Chambers v. Maroney, ([3rd Cir.,1969] 408 F.2d 1186, 1195, aff'd, 399 U.S. 42, 53ff, 26 L.Ed.2d 419, 429ff, 90 S.Ct. 1975 [1970]). See also United States v. Winston (9th Cir., 1980), 613 F.2d 221; Satchell v. Cardwell (9th Cir.,1980) 653 F.2d 408 United States States v. Swinehart (3rd Cir., 1980), 617 F.2d 336. In addition to the Third and the Ninth Circuits, the same rule applies in the District of Columbia Circuit (United States v. Decoster [D.C. Cir., 1979] 624 F.2d 196, 203ff, and

United States v. Wood [D.C. Cir., 1980] 628 F.2d 554), and the Fifth Circuit (Washington v. Watkins [5th Cir., 1981] 655 F.2d 1346, 1360ff). Compare Cuyler v. Sullivan, 446 U.S. 335, 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980) and United States v. Morrison, 449 U.S. 361, 66 L.Ed.2d 564, 101 S.Ct. 665 (1981).

Under the Rule applicable in the Circuits referred to above, Mylar would not prevail unless he showed (1) that his attorney's failure to file a brief on original submission constituted ineffective assistance of counsel and (2) that the attorney's action prejudiced his appeal. For the sake of argument, it is conceded on this point that counsel's action rendered his assistance ineffective but was there any prejudice? In the context of this issue prejudice at a minimum would consist in Mylar's having available to him an issue on appeal which

might have resulted in a new trial but which was waived by his lawyer's failure to file a brief. As discussed at length at page 30 and following, the attorney's failure to file a brief waived no error in the record. Thus, as a matter of law the attorney's failure to file a brief could not have been prejudicial.

In deciding this case without reference to prejudice, the Eleventh Circuit ruled contrary to the rules prevailing in the District of Columbia, Third, Fifth and Ninth Circuits. For this reason the writ ought to issue.

CONCLUSION

In conclusion the Petitioners respectfully submit that this case presents an apparent conflict in the opinions of this Honorable Court in various cases, the decision of the Court

of Appeals conflicts with those of this Honorable Court and those of other circuits. For these reasons the Petitioners pray that this Honorable Court will issue the writ of certiorari and review the decision and opinion of the Honorable Court of Appeals and on such review will reverse the decision of said Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and Commissioner Britton, Petitioners, do hereby certify that on this _____ day of June, 1982, I did serve the requisite number of copies of the foregoing on the Attorney for Danny Ray Mylar, Respondent, by mailing same to her, first class postage prepaid and addressed as follows:

Hon. Linda Friedman
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